

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8285 of 2001

with

SPECIAL CIVIL APPLICATION No 9660 of 2002

with

SPECIAL CIVIL APPLICATION No 9703 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

GUJARAT STATE EXPORT CORP.LTD.

Versus

MADHUSUDAN L. KHANDWALA

Appearance:

1. Special Civil Application No. 8285 of 2001
MR KM PATEL for Petitioner No. 1
MR GOPESH J SONI for Respondent No. 1
RULE SERVED for Respondent No. 2
2. Special Civil Application No. 9660 of 2002
MR KM PATEL for Petitioner No. 1

MR GOPESH J SONI for Respondent No. 1
3. Special Civil Application No. 9703 of 2002
MR KM PATEL for Petitioner No. 1
MR GOPESH J SONI for Respondent No. 1

CORAM : MR.JUSTICE RAVI R.TRIPATHI

Date of decision: / /2003

COMMON C.A.V. JUDGEMENT

All these petitions are filed by Gujarat State Export Corporation Ltd. (hereinafter referred to as "the petitioner corporation"). It is a Govt. company incorporated under the Companies Act, 1956. The respondent in Special Civil Application No.8285 of 2001 was working as Company Secretary and Senior Manager. He retired from the service of the petitioner corporation on 31.7.1998 on attaining the age of superannuation having put in 32 years and 4 months of service.

1.1 The respondent in Special Civil Application No.9660 of 2002 was lastly working as Deputy Manager and retired from service on 31.5.2000 on attaining the age of superannuation having put in 29 years of service.

1.2 The respondent in Special Civil Application No.9703 of 2002 had joined the service of the petitioner corporation on 29.9.1969 and retired on 28.2.1998 on attaining the age of superannuation when he was working as Senior Assistant after having put in 28 years of service. In all these petitions a common question arises for consideration of the Court, viz. whether the Controlling Authority under the Payment of Gratuity Act, 1972 (hereinafter referred to as "the Act") has jurisdiction to enforce a private scheme of gratuity and direct payment of differential amount, if under the private scheme there is entitlement to higher amount of gratuity. The answer to the aforesaid question is to be given in light of the provisions of Clauses (a) and (b) of subsection (4) of section 7, which read as under:

" xxxxx

(a) If there is any dispute as to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of or in relation to an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the

controlling authority such amount as he admits to be payable by him as gratuity.

(b) Where there is a dispute with regard to any matter or matters specified in clause (a) the employer or employee or any other person raising dispute may make an application to the controlling authority for deciding the dispute."

2. On a combined reading of the aforesaid two clauses it is clear that the controlling authority is required to adjudicate the claim of the gratuity payable to an employee under the Act. There is no scope for a debate on the point that there can be a private scheme. The only requirement for such scheme is that it should be more beneficial than the provisions of the Act. There is no doubt that if an employer agrees to provide more benefits than the benefits flowing from the Act he can always have private scheme but then whether the employees can approach the Controlling Authority under the Act for enforcement of such additional benefits. So far as enforcement of the minimum benefits which flow from the Act are concerned an employee can approach the Controlling Authority and the Controlling Authority in view of the aforesaid provisions of law can enforce such rights of the employees.

3. In the present case the facts are that unlike under the Act, wherein an employee is entitled to 15 days salary for the services of one year with maximum limit of 16 months subject to a further limit of Rs.3,50,000/-, the Corporation had a scheme under which one month's salary for each completed year of service subject to maximum of 20 months' salary. This limit of maximum 20 months' salary was then amended and was made 15 months.

3.1 In the case of respondent in SCA No.8285 of 2001 at the time of his superannuation he was getting Rs.11,742/-, and on the basis of that he was paid a sum of Rs.2,32,019/-, as gratuity after deducting an amount of Rs.2,821/- as TDS. The difficulty arose only on account of the decision of the petitioner corporation to revise the pay scales on the lines of 5th Pay Commission's recommendations. Under that revision, the pay of the respondent on the date of his retirement was ascertained to be Rs.17,843/-. Accordingly, the respondent was paid an amount of Rs.50,648/- towards difference in gratuity.

3.2 The claim of the respondent is that he is entitled to 20 months salary by way of gratuity under the

scheme of the Corporation (prior to amendment) with maximum of Rs.3,50,000/-, he having received a sum of Rs.2,32,019/-, he is further entitled to Rs.1,17,981/-. This amount is claimed with 20% interest thereon. As against that the case of the petitioner corporation is that while deciding to revise the pay scales on the lines of recommendations of 5th Pay Commission, the corporation also decided to amend the scheme of Gratuity wherein the maximum limit of 20 months' salary was reduced to the maximum limit of 15 months' salary. According to the petitioner corporation by virtue of this amendment of the scheme, the respondent was entitled to an additional amount which is paid by the corporation as aforesaid.

4. The respondent being dissatisfied of that filed an application before the controlling authority claiming gratuity on the basis of unamended private scheme. The controlling authority accepted the same and ordered payment. Against that the petitioner corporation filed an appeal, which came to be dismissed. Being aggrieved of that these petitions are filed before this Court.

5. The learned advocate Mr.K.M. Patel submitted that firstly the Controlling Authority had no jurisdiction to adjudicate the claim of the respondent as the same was not flowing from the provisions of the Act. The petitioner corporation had simultaneously taken two decisions, (i) of revising pay scales on the lines of 5th Pay Commission's recommendations, and (ii) of reducing maximum limit from 20 months' salary to 15 months' salary under its private scheme. The learned advocate submitted that if the decision of the petitioner corporation is accepted by employees qua revision of pay, the employees shall accept the decision of reducing the 'maximum limit' of gratuity. In the alternative Mr.Patel submitted that an employee can press for the benefits available under the Act only. The Act provides that an employee is entitled for 15 days' salary for each completed year of service, accordingly the respondent in Special Civil Application No.8285 of 2001 will be entitled to 16 months' salary by way of gratuity. He submitted that an employee cannot insist for payment of gratuity under the old (unamended) private scheme where the maximum limit was of 20 months. He submitted that in the event of there being a private scheme if one is not getting equal or more benefits which are otherwise available under the Act, the employees can press for grant of benefits equal to the one available under the Act. He submitted that the employees cannot force the petitioner corporation to pay as per the private scheme by approaching the

Controlling Authority under the Act. Mr. Patel relied upon a decision of the Kerala High Court in the matter of Ayyappan Vs. Joint Labour Commissioner, reported in 1999 (II) LLJ 1351. He relied upon para 4 of the judgement which reads as under:

"4. Sec.7 of the Act enables an employee to approach the controlling authority for determination of the amount towards gratuity. Sec.7 can be invoked only by "a person who is eligible for payment of gratuity under this Act." The gratuity claimed by the petitioner is not under this Act but under Ex. P2. Under the Act the petitioner is entitled only to the rate as mentioned in subsection 2 of sec.4. The amount granted in Ext.P4 is equal to that rate. Therefore, limiting of the gratuity payable to the petitioner under the Act to 15 days' wages for every completed year as contained in Ext. P4 is justified though on a different ground. On that basis the petitioner cannot challenge the quantum of gratuity directed to be paid in Ext. P4. Therefore, Ext. P4 to that extent alone is upheld. But the finding that Ext.P2 is not applicable to the petitioner is set aside and left open.

The petitioner is free to agitate for the balance amount in terms of Ext. P2 before the appropriate forum. Leaving that liberty to the petitioner Original Petition is dismissed confirming Ext. P4."

6. Mr.Patel, the learned advocate next relied upon a judgement of Calcutta High Court in the matter of Williamson Magor and Co. Ltd. and another vs. Naru Gopal Laik and others, reported in 1998 (80) FLR 538 to contend that if a scheme is subsequently introduced when the respondent was not in the employment of the company, then the respondent cannot get the benefits of the scheme. He submitted that the petitioner corporation had taken decisions after the date of superannuation of the respondent, i.e. 31.7.1998 and therefore, the respondent has either to accept both the decisions or waive both of them. He submitted that if the respondent decides to take benefits of the revised pay scale, the amended scheme of gratuity and the maximum limit prescribed therein of 15 months will also be required to be accepted. Mr.Patel fairly submitted that so far as maximum limit of 15 months is concerned the same will not be applicable to the respondent as he has put in 32

years' service, therefore, under the provisions of the Act he will be entitled to 16 months' salary which is paid. But then he submitted that the respondent could not have insisted for and could not have approached the Controlling Authority for enforcement of unamended private scheme for getting the benefit of maximum limit of 20 months' salary. Mr. Patel relied upon the following observations made in the case of Williamson Magor & Co. Ltd. (supra). The learned Judge referred to a decision of the Honourable the Apex Court in the matter between Andhra Pradesh State Pensioners' Association v. State of Andhra Pradesh and quoted as under:

"The claim for gratuity can be made only on the date of retirement and if it is already paid on that footing then the transaction is completed and closed. It cannot then be reopened as a result of the enhancement made at a later date. This concept of gratuity is different from pension. Supreme Court in Andhra Pradesh State Pensioners' Association v. State of Andhra Pradesh, observed as follows, in para 2 at page 1061.

"We fully concur with the view of the High Court.

The upward revision of gratuity takes effect from the specified date (April 1, 1978) with prospective effect. The High Court has rightly understood and correctly applied the principle propounded by this Court in Nakara case An illustration will make it clear. Improvements in pay scales by the very nature of things can be made prospectively so as to apply to only those who are in the employment on the date of the upward revision. Those who were in employment say in 1950, 1960 or 1970, lived, spent, and saved, on the basis of the then prevailing cost of living structure and pay scale structure, cannot invoke Art.14 in order to claim the higher pay scale brought into force say, in 1980. If upward pay revision cannot be made prospectively on account of Art.14 perhaps no such revision would ever be made. Similar is the case with regard to gratuity which has already been paid to the petitioners on the then prevailing basis as it obtained at the time of their respective dates of retirement. The amount got crystallized on the date of retirement on the basis of the salary drawn by them on the date of retirement. And it was already paid to them on that footing. The transaction is completed and closed. There is no

scope for upward or downward revision in the context of upward or downward revision of the formula evolved later on in future unless the provision in this behalf expressly so provides retrospectively (downward revision may not be legally permissible even). It would be futile to contend that no upward revision of gratuity amount can be made in harmony with Art.14 unless it also provides for payment on the revised basis to all those who have already retired between the date of commencement of the Constitution in 1950 and the date of upward revision. There is, therefore, no escape from the conclusion that the High Court was perfectly right in repelling the petitioner's plea in this behalf. "

(emphasis supplied)

Mr.Patel also invited attention of the Court to the decision of the Honourable the Apex Court in the matter of Indian Ex- Services League V. Union of India, which is referred to by the learned Judge on page 545, which reads as under:

"The same view has been expressed by Supreme Court in Indian Ex- Services League Vs. Union of India, in para 21, at page 396, of the reported decision. Supreme Court observed as follows:

"One of the prayers made in these writ petitions is for grant of same death cum retirement gratuity to the pre-1 April 1976 retirees A similar claim was rejected by this Court in State Government Pensioners' Association V. State of Andhra Pradesh, on the ground that the claim for gratuity can be made only on the date of retirement on the basis of the salary drawn on the date of retirement and being already paid on that footing the transaction was completed and closed. It could then not be reopened as a result of the enhancement made at a later date for persons retiring subsequently. This concept of gratuity being different from pension has also been reiterated by the Constitution Bench in Krishna Kumar case. With respect we are in full agreement with this view. This claim of the petitioners also therefore, fails."

From the above decisions of Supreme Court it is clear that gratuity is ordinarily paid only once on retirement. The amount gets crystallised on

the date of retirement on the basis of salary drawn by the employee on the date of retirement and if the amount is already paid to the employee on that footing then the transaction is completed and closed. It cannot then be reopened as a result of enhancement made at a later date for persons retiring subsequently unless the provisions in this behalf expressly so provides retrospectively. True, the above referred decision of Supreme Court related to State employees, but the principles laid down in those cases regarding gratuity are also applicable subject to the provisions of Payment of Gratuity Act, 1972, to the cases under the said Act."

7. Mr. Master, the learned advocate appearing for the respondents pressed into service the following averments made in the affidavit filed by the respondents which reads as under:

"I further say that the petitioner corporation has modified the scheme in 1977 reducing the maximum ceiling of 20 months salary as gratuity to 15 months salary. The respondent say that said scheme was never implemented by the Managing Director for which the petitioner corporation itself was responsible. It is alleged by the petitioner corporation that I have not implemented the said scheme looking to the interest of the respondent. The respondent says that in the year 1977 I had no any personal interest and further I was working under the administrative control of the Managing Director and therefore, it is the duty of the Managing Director to get the board's Resolution implemented regarding modification made in the gratuity scheme. The Managing Director was to take the matter with the Govt. but the same was not done by him. "

(emphasis supplied)

8. After perusing the aforesaid averments this Court by order dated 5.2.2003 had directed the respondent to file his 'duty list' as the respondent was serving as Company Secretary with the petitioner Corporation since 1968. The respondent (in SCA No.8285 of 2001) filed an affidavit dated 12.3.2003 wherein it is stated that,

"On 22nd January 1968, I was promoted as Company

Secretary and Accountant by the Board of Directors in its meeting held on 22.1.1968 and enumerated duty as Secretary and Accountant. A copy of the resolution is annexed at Annexure 'A'. Besides secretarial work I was required to handle different departments from time to time as per the instructions and directives given by the Managing Director.

Till 6th April 1974 besides Secretarial work I was looking after accounts, finance, taxation and audit of the corporation. Thereafter, accounts was separated and I was asked to take care of the Office Administration and Personnel matters till June 1985. Thereafter, for about nine years export marketing and four years Air Cargo Complex at Ahmedabad Airport was handled."

9. The duty list of the respondent was asked for as the case the case of the respondent is that the petitioner corporation though modified the scheme in 1977 reducing the maximum ceiling of 20 months' salary to 15 months' salary, the said modification was never implemented by the Managing Director and corporation must be held responsible for the same and the corporation must bear the burden. It is a matter of which judicial notice can be taken that after the Board of Directors takes a decision, it is the duty of the subordinate officers, more particularly the officer like Company Secretary to see that the decision is implemented. Be that as it may, the fact remains that the scheme was modified in the year 1977 only because it was not implemented, will not render the same nugatory and no right can accrue in favour of the respondent of getting the gratuity as per the unamended scheme.

10. It is submitted on behalf of the respondent that in the year 1975 the petitioner corporation had decided to join LIC's Group Gratuity- cum-- Term Assurance Scheme, under which the petitioner corporation was required to send, in the month of February/ March, the details of salary (basic + DA) of the existing employees, in case of newly recruited persons, date of joining, salary and age were to be given and the details of the employees left during the year also were to be given. Based on this information, LIC used to send every year 'Cost benefit schedule and sheets' with the amount of annual premium payable. In the said sheet they used to mention about maximum 20 months' salary payable to the employees as gratuity. The submission is that in view of that the respondent should be paid the gratuity on the

basis of maximum 20 months' salary, and not on the basis of the modified scheme. It is also contended that the amendment of the scheme by the Board of Directors reducing the maximum limit from 20 months to 15 months was without obtaining prior approval from the Commissioner of Income Tax which was required under Rule 110 and hence the same remained as a paper amendment only as it was not implemented till the year 1999-2000. The LIC was paid premium as per the original scheme of 1973 and the gratuity was paid to the employees as per old scheme till February 1999. These submissions are required to be considered in light of the fact that after the respondent reached the age of superannuation on 31.7.1998 gratuity became payable which was paid on the basis of his last drawn salary, i.e. Rs.11,742/-. It is subsequent to that the Board decided to revise pay scales on the lines of the recommendations of 5th Pay Commission and simultaneously decided to implement the amended scheme and reduced the limit of 20 months' salary to 15 months'. To contend that so far as the decision of the Board which is subsequent to the date of superannuation of the respondent about revision of pay is applicable to the respondent and other employees and the decision of reducing maximum limit from 20 months' salary to 15 months' is not applicable is like blowing hot and cold in the same breath, which cannot be allowed.

11. As discussed hereinabove so far as benefits arising from the Act are concerned for the enforcement of the same an employee can approach the Controlling Authority in view of the provisions of section 7(4)(a) & (b) of the Act. But if a benefit is accruing from a private scheme, in view of the decision in the matter of Ayyappan (supra), the authority could not have been approached.

12. Mr. Master, the learned advocate placed reliance on the following decisions to contend that the Controlling Authority can entertain a claim on the basis of settlements.

(i) Ramjilal Chimanlal Sharma Vs. M/s Elphinstone Spinning and Weaving Mill Co. Ltd. and another, reported in 1984 LAB IC 1703 (Bombay High Court);

(ii) Dholpur Kraya Vikraya Sahkari Samiti Ltd. Vs. Controller under Payment of Gratuity Act, Bharatpur and others, reported in 2000 (I) LLJ 663 (Rajasthan High Court);

(iii) Eastern Coal Fields Ltd. Vs. Regional Labour Commissioner (Central) and others, reported in 1982 (44) FLR 365 (Calcutta High Court);

(iv) Decision of the Honourable the Apex Court in the matter between State Government Pensioners' Association and others Vs. State of Andhra Pradesh, reported in (1986) 3 SCC 501;

These decisions have no application to the facts of the present case, hence the same are not discussed in detail. As against that the decision in case of Ayyappan (supra) of Kerala High Court is referred and relied upon by Mr. Patel wherein it is held that the Controlling Authority can order payment of gratuity only in terms of the Act. No decision of the Honourable the Apex Court on the point is cited. In considered opinion of this Court, the benefits, to the extent the same are flowing from the provisions of the Gratuity Act, the Authority under the Act has power to adjudicate for the same. But if benefits sought for are arising from a settlement or private scheme, the same cannot be agitated before the Authority under the Act.

13. In the present case the Controlling Authority could have directed the petitioner corporation to grant benefit to the extent the same was flowing from the provisions of the Act and should have restrained itself from ordering payment on the basis of private scheme. When the private scheme provides for payment of one month salary for each completed year of service it has reason to provide for maximum limit also. If the provisions of the private scheme are less beneficial, then under the provisions of the Act an employee can approach the Controlling Authority and the Controlling Authority can order enforcement of rights flowing from the Act. In the present case the respondent in Special Civil Application No.8285 of 2001 is concerned he has put in 32 years of service. Under the provisions of the Act he is entitled to get 16 months' salary. To that extent his claim for payment of 16 months' salary deserves to be allowed.

14. In the result, petitions succeed. The judgements and orders of the Controlling Authority as confirmed by the appellate authority in all these petitions are hereby quashed and set aside. However, the petitioner corporation is directed to pay the amount of gratuity to the respondents on the basis of private scheme as it stood on the day when the right accrued in favour of the employees or on the basis of Payment of Gratuity Act

whichever is more beneficial to the employee. Rule is made absolute to the aforesaid extent only. No order as to costs.

(Ravi R. Tripathi, J.)

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